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James Gaspich

Blaise Curet

NINTH CIRCUIT SURVEY SUMMARIES

CONSTITUTIONAL LAW

NINTH CIRCUIT UPHOLDS CONSTITUTIONALITY OF FEDERAL MAGISTRATE ACT OF 1979

I. INTRODUCTION

In *Pacemaker Diagnostic Clinic of America v. Instromedix, Inc.*,[1] the Ninth Circuit upheld the constitutionality of Section 636(c) of the Federal Magistrate Act of 1979.[2]

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1. 725 F.2d 537 (9th Cir. 1984) (per Kennedy, *en banc* consideration; Schroeder, with whom Pregerson and Canby join, dissenting), *cert. denied*, 53 U.S.L.W. 3236 (1984).

2. The Federal Magistrate Act of 1979, 28 U.S.C. §636(c) (1979), *as added* by Act of October 10, 1979, Pub. L. 96-82, § 2, 93 Stat. 643. Section 636(c) of the Federal Magistrate Act of 1979 was added to amend the current jurisdictional provisions for U.S. magistrates in order to further clarify and expand the jurisdiction of U.S. magistrates and improve access to the federal courts for the less advantaged. Under this new section, magistrates have the authority to conduct civil trials and enter final judgment upon the consent of the parties. Section 636(c) (1), which was provided by the Act of October 10, 1979, provides:

> (c) Notwithstanding any provision of law to the contrary—
>
> (1) Upon consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or non-jury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. Upon the consent of the parties, pursuant to their specific written request, any other part-time magistrate may exercise such jurisdiction, if such magistrate meets the bar membership requirements set forth in section 631(b) (1) and the chief judge of the district court certifies that a full-time magistrate is not reasonably available in accordance with the guidelines established by the judicial council of the circuit. When there is more than one judge of a district court, designation under this paragraph shall be by the concurrence of a majority of all the

Pacemaker instituted an action for patent infringement against Instromedix, and Instromedix counterclaimed for a declaration of the patent's invalidity. The parties consented to have the case tried before a U.S. magistrate, pursuant to the local rules of Oregon and 28 U.S.C. §636(c).

The magistrate held the patent valid, but not infringed. Both parties appealed, and a panel of the Ninth Circuit, *sua sponte*, raised the issue of the constitutionality of trial by a magistrate. The panel held the statute invalid and vacated the judgment.[3] Subsequently, an order was issued granting a rehearing *en banc*.[4]

II. The Court's Analysis

A. *The Majority*

The Ninth Circuit granted a rehearing to determine the constitutionality of Section 636(c), and found it constitutional on two grounds. First, the court found that although the statute gave the appearance of granting article III authority to non-article III judges, the ultimate control remained at all times with article III judges.[5] Additionally, the freely and voluntarily given consent of the parties to magistrates' jurisdiction cured any constitutional defects in the section.[6]

The Ninth Circuit concluded that the proper standard to determine whether there was an improper interference or delegation of the independent power of a branch of the federal government is whether the alteration prevents or substantially impairs performance by the branch of its essential role in the constitutional system.[7] The general rule is that if the essential constitutional role of the judiciary is to be maintained, there must be both the appearance and the reality of control by article III judges over the interpretation, declaration and application of federal law.[8]

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judges of such district court, and when there is no such concurrence, then by the chief judge.

3. Pacemaker Diagnostic Clinic v. Instromedix, Inc., 712 F.2d 1305 (9th Cir. 1983).
4. Pacemaker Diagnostic Clinic v. Instromedix, Inc., 718 F.2d 971 (9th Cir. 1983).
5. *Pacemaker*, 725 F.2d at 544-46.
6. *Id.* at 542-43.
7. *Id.* at 544.
8. *Id.* See Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S.

In *Pacemaker*,[9] the Ninth Circuit held that the control of article III judges over magistrates under 28 U.S.C. §636(c) contained sufficient protections against the erosion of judicial power to overcome the constitutional objections leveled against it.[10] Furthermore, the Ninth Circuit found that the statute invests the article III judiciary with extensive administrative control over the management, composition and operation of the entire magistrate system. Magistrates are appointed by district judges,[11] and subject to removal by them.[12] In addition, district judges retain plenary authority over when, what and how many pretrial matters are assigned to magistrates.[13]

The court continued its constitutional analysis of Section 636(c) stating that, if the section contained mandatory provisions for trial of an unrestricted class of civil cases by a magistrate and not by an article III judge, it would be unconstitutional.[14] However, the court also stated that the right to trial by an article III judge may be waived with the informed and volun-

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50, 58-60 (1982); United States v. Raddatz, 447 U.S. 667, 685 (1982).

9. The Ninth Circuit began its analysis of the control of article III judges over U.S. magistrates by declaring the historical significance of the attributes of article III judges: "The attributes of Article III judges, permanency in office and the right to an undiminished compensation, are as essential to the independence of the judiciary now as they were when the Constitution was framed." 725 F.2d at 541. *See* THE FEDERALIST Nos. 78 and 79 (A. Hamilton); *Northern Pipeline*, 458 U.S. at 58-60; United States v. Will, 449 U.S. 200, 217-21 (1980). The court further declared that the significance of these attributes, which were set forth to guarantee a separate and independent judiciary, "are present constitutional necessities, not relics of antique ideas." 725 F.2d at 541.

10. *Id.* In *Raddatz*, 447 U.S. at 667, the court emphasized that delegation to a non-article III judicial officer is permissible as long as the ultimate decision is made by the district court. In Wharton-Thomas v. United States, 721 F.2d 922 (3rd Cir. 1983), a case decided just before *Pacemaker*, the Third Circuit held that 28 U.S.C. §636(c) did not violate the Constitution for four reasons, all of which were included in the Ninth Circuit's reasoning. The four reasons are: (1) the reference to a magistrate is consensual; (2) the district judge has the power to vacate the reference; (3) the magistrate is appointed by the district judge, is a part of the district court, and is specially designated to try cases; and (4) the parties have a right of appeal to a district judge or the court of appeals. 721 F.2d at 930.

11. 28 U.S.C. §631.

12. *Id.*

13. Article III authority is also preserved in other respects. District courts retain the power to adjudge a party in contempt. 28 U.S.C. §636(e). Sections 636(c) (3) and (4) provide for appellate review of the judgment of the magistrate by the appropriate court of appeals as a matter of right or, if the parties consent, by the district court. 28 U.S.C. §§636(c) (3), (4). Article III courts retain full authority over questions of law.

14. 725 F.2d at 541.

tarily given consent of the parties.[15]

In *Wharton-Thomas v. United States*, the Third Circuit concluded that consent of all parties under Section 636(c) cures any constitutional defects.[16] The Ninth Circuit adopted the *Wharton-Thomas* decision, noting that the Supreme Court has allowed criminal defendants to waive even fundamental rights.[17] The court pointed to these cases to support its conclusion that parties may waive personal rights to have cases heard by an article III judge as long as the waiver is freely and voluntarily obtained.

The Ninth Circuit offered several justifications for its conclusions regarding the importance of consent to magistrates' jurisdiction. First, the court pointed out that in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,[18] the Supreme Court's most recent interpretation of Article III, all the justices indicated that consent is important to the constitutional analysis.[19] The Ninth Circuit also gave considerable weight to the judgment that Congress has stated that consent of the parties eliminates constitutional objections.[20] Congress added Section 636(c) (2) in its 1979 Amendment to the Act in recognition of

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15. *Id.*

16. 721 F.2d at 925-26.

17. 725 F.2d at 543. Garner v. United States, 424 U.S. 648 (1976) (right to be free from self-incrimination); Adams v. United States *ex rel.* McCann, 317 U.S. 269 (1942) (right to counsel); Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (right to be free from unreasonable searches and seizures); Barker v. Wingo, 407 U.S. 514 (1972) (right to a speedy trial); Duncan v. Louisiana, 391 U.S. 145 (1968) (right to a jury trial); Boykin v. Alabama, 395 U.S. 243 (1968) (right to trial itself and guilty pleas).

18. *See supra* note 8.

19. 725 F.2d at 542.

20. *Id.* at 542. The Senate Report to the Federal Magistrate Act of 1979 gave explicit consideration to the importance of the consent of the parties, and states in part:

> This bill makes it clear that the voluntary consent of the parties is required before any civil action may be referred to a magistrate. In light of this requirement of consent, no witness at the hearings on the bill found any constitutional question that could be raised against the provision. Near unanimity existed among the witnesses on the overall constitutionality of the bill . . . This bill clearly requires the voluntary consent of the parties as a prerequisite to a magistrate's exercise of the new jurisdiction. The committee firmly believes that no pressue, tacit or expressed, should be applied to the litigants to induce them to consent to trial before the magistrates.

S. REP. No. 74, 96th Cong., 1st Sess. 1, *reprinted in* 1979 U.S. CODE CONG. & AD. NEWS 1469, 1473.

the importance of consent.[21]

Finally, the Ninth Circuit found that consent to magistrates' jurisdiction would not be acceptable if the alternative to trial by magistrate were the imposition of serious burdens and costs on the litigant.[22] The court maintained that if it were shown that the choice was between trial before a magistrate or the endurance of delay or other measurable hardships not justified by the needs of judicial administration, then there would be a question as to whether any consent given was truly voluntary. However, the court found that no such burdens or hardships were demonstrated. The court further found that access to district judges is not so restricted that adjudication of cases by magistrates is a compelled alternative.[23]

In the last portion of its analysis, the Ninth Circuit dismissed the argument that in the federal system a party may not consent to jurisdiction, so that the parties may not waive their rights under article III. The court rejected this argument because it is only applicable where the parties attempt to confer upon an article III court a subject matter that Congress or the Constitution forbids.[24] Patent law, the subject matter of the *Pacemaker* case, is exclusively one of federal law. The Supreme Court has explicitly held that Congress may confer upon federal courts jurisdiction conditioned upon a defendant's consent.[25] Thus, the Ninth Circuit concluded that Section 636(c) does not expand article III jurisdiction but allows the transfer to another federal forum, comparing the consent to magistrates' jurisdiction to waiver of a defect in jurisdiction over the person, a waiver

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21. Section 636(c) (2), which was added by the Act of October 10, 1979, Pub. L. 96-82, §2, 92 Stat. 643, provides:

> If a magistrate is designated to exercise civil jurisdiction under paragraph (1) of this subsection . . . the decision of the parties shall be communicated to the clerk of the court. Thereafter, neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent to reference of any civil matter to a magistrate. Rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent.

22. 725 F.2d at 543.

23. *Id.*

24. *Id.*

25. Williams v. Austrian, 331 U.S. 642, 652 (1947); and Harris v. Avery Brundage Co., 305 U.S. 160 (1938).

federal courts permit.[26]

B. *The Dissent*

In a sharply-worded dissent, Judge Schroeder contended that the majority based its holding on three fundamentally misguided assumptions: that the exercise of judicial power can depend upon stipulations of the litigants; that magistrates who operate under the thumbs of district court judges have the independence the Constitution is designed to ensure; and that consent to use of a magistrate can be presumed to be voluntary when the explicit purpose of the consensual provision of the Magistrate Act was to encourage certain classes of litigants to abandon their right to article III adjudication.[27] The dissent argued that the Magistrate Act, and Section 636(c) in particular, create mutations in our system of government that transend its impact on individual litigants. The dissent was particularly concerned that Section 636(c) would herald the loss of the independent exercise of judicial power, the principal check on encroachment by the legislative and executive branches, and also legislative and executive checks on incursions by the judiciary.[28]

The dissent also contended that the independence of the judiciary is threatened even where district court judges maintain the appearance and reality of control over civil cases handled by magistrates because of the dangerous implications of judges having control over other judges. This structure creates the potential for conflicts of interest for magistrates who must choose be-

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26. Hoffman v. Blaski, 363 U.S. 335, 343 (1960).

27. 725 F.2d at 547.

> The first assumption is that under our constitutional system the exercise of the judicial power of the United States by article III judges can depend upon stipulations of the litigants. The second is that magistrates, who operate under the thumb of the district court judges and whose salaries are not protected from retaliatory diminution by Congress, have the independence the Constitution is designed to ensure. The third is that consent to use of a magistrate can be presumed to be voluntary when the explicit purpose of the consensual reference provision of the Magistrates Act was to encourage certain classes of litigants to abandon their right to article III adjudication because existing overburdened district judges could not hear all cases promptly.

Id.

28. 725 F.2d at 549.

tween what they conclude is right and the result they feel will please the district court. In this regard, Judge Schroeder maintained that under our Constitution no judge should be accountable to any other judge and that in reality, the control of district judges over magistrates prevents the independence of decision making.[29]

Finally, Judge Schroeder contended that the freely and voluntarily given consent of the parties was merely the "illusion of voluntary consent."[30] The dissent pointed out that the Federal Magistrate Act was perceived by Congress as a means to cope with an increasingly crowded federal docket, and that greater availability of magistrates would induce economically disadvantaged litigants, unable to afford the delay and cost of waiting for adjudication by an article III judge, to consent to trial before a magistrate.[31]

The dissent strongly urged that this sort of freely and voluntarily given consent to magistrates' jurisdiction easily becomes coerced.[32] The dissent noted that the majority and the Third Circuit in *Wharton-Thomas*[33] both admit that pressure on parties to submit to magistrates' jurisdiction increases in direct proportion to the number of magistrates positions.[34] The majority argued that the process can be reversed when the situation becomes intolerable.[35] The dissent disagreed and instead maintained that the Constitution should prevent this type of coercion from ever occurring.[36]

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29. Kaufman, *Chilling Judicial Independence*, 88 YALE L.J. 681, 715 (1979); Wallace, *Judicial Administration in a System of Independents: A Tribe With Only Chiefs*, 1978 B.Y.U.L. REV. 39, 56; Chandler v. Judicial Council, 398 U.S. 74 (1970).

30. 725 F.2d at 553.

31. *Id.*

32. *Id.*

33. 721 F.2d at 930-31.

34. 725 F.2d at 554.

35. *Id.* at 556.

36. Circuit Judge Pregerson wrote a separate dissent to make one point. He noted that although magistrates perform important judicial functions, the mantle of independence essential to article III decisionmaking is withheld from them. To correct this situation, Judge Pregerson reasoned that "magistrates should be awarded Article III protections commensurate with the Article III work they now so commendably perform." Judge Pregerson's simple solution to the issue before the Ninth Circuit in *Pacemaker* was to make magistrates article III judges. *Id.* at 555.

III. Conclusion

The Ninth Circuit held that the elements of control and the parties' consent present in 28 U.S.C. §636(c) are sufficient to overcome constitutional objections. In its conclusion, the Ninth Circuit mentioned compelling policy reasons, in addition to the elements of control and consent, which require finding the section constitutional. The reasons described were that article III courts have an increasing volume of cases and the assignment of certain matters to magistrates aids in the efficient administration of the judiciary. The court also reasoned that the legislature and the judiciary act responsibly when they provide and explore new, flexible methods of adjudication. Therefore, for both Constitutional and compelling policy reasons, the Ninth Circuit found Section 636(c) of the Federal Magistrate constitutional.

The dissent very succinctly pointed out the flaws in the majority's reasoning. And while a comparison of the dissent to the majority opinion may warrant the conclusion that the dissent has the Constitution on its side, there is one item noticeably missing from the dissent's reasoning. It offers no solution to the very real problem of an extremely overburdened judiciary. The majority therefore reached the only possible practical holding—that Section 636(c) of the Federal Magistrate Act of 1979 is constitutional.

*Tova Zeff**

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* Golden Gate University School of Law, Class of 1985.

SCHOOL DISTRICT'S RESTRAINT ON PUBLIC COMMENT BY EMPLOYEES: A FIRST AMENDMENT INFRINGEMENT

I. INTRODUCTION

In *Anderson v. Central Point School District No. 6*,[1] the Ninth Circuit held that a school district's "channels"[2] policy infringed upon activity protected by the first amendment.[3] The court rejected the school district's assertion that the Supreme Court's decision in *Connick v. Myers*[4] required a reversal of the lower court. Instead, the court distinguished *Connick* and found the communication in question to be protected activity.[5]

Plaintiff, a teacher-coach employed by defendant school district, attended and spoke at an open meeting[6] conducted by the Board of Education to discuss its athletic policies. Shortly thereafter, plaintiff sent a letter to members of the Board which proposed changes in the district's athletic program. The letter was written in violation of the district's "channels rule" which required all employees to channel their remarks to the Board through the superintendent.[7]

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1. 746 F.2d 505 (9th Cir. 1984) (per curiam; the panel members were Goodwin, J., Schroeder, J.J., and Aguilar, D.J., sitting by designation.)

2. The district's "channels" policy required advance notice to the superintendent of any direct message sent to school board members by teachers. Defendants sought to justify the policy as furthering significant governmental interests in conserving the time of board members and permitting the administration the opportunity to comment on the accuracy of communications sent to the board. Anderson v. Central Point School District No. 6, 554 F.Supp. 600, 608 (D. Or. 1982).

3. The amendment states in relevant part: "Congress shall make no law . . . abridging the freedom of speech . . ." U.S. CONST. AMEND. I.

4. 461 U.S. 138 (1983). *Connick* was a civil rights action in which plaintiff contended she was terminated from her job as an assistant district attorney because she exercised her right to free speech. The Supreme Court disagreed, holding the discharge was not offensive to the first amendment because the speech in question was not of public concern. *Id.* at 140.

5. 746 F.2d at 507.

6. Plaintiff spoke for the five minutes allotted to each speaker at the meeting. *Id.* at 506.

7. The lower court had held the "channels" policy was an impermissible prior restraint on the right to free speech. 554 F.Supp. at 608.

The superintendent responded by admonishing plaintiff for communicating directly with the Board and for his failure to send the proposal through the proper channels. Moreover, plaintiff was informed that he would not be assigned another coaching job anywhere within the school district.[8]

Alleging his suspension resulted from the direct communication with the Board, plaintiff filed suit against the school district and the district's school superintendent under 18 U.S.C. § 1983.[9] Plaintiff claimed the communication was activity protected by the first amendment and sought an injunction against application of the "channels" policy. He also sued for damages for physical and emotional distress and injury to his reputation and employability.[10] After a jury trial and verdict for the plaintiff, the lower court entered a permanent injunction prohibiting the school district's application of the policy to matters of public concern.[11] Defendant then appealed to the Ninth Circuit.

II. The Court's Analysis

The primary issue considered by the Ninth Circuit was whether the lower court's decision was consistent with the Supreme Court's holding in *Connick*.[12] Initially, the court noted that the lower court properly applied the test stated in *Pickering v. Board of Education*[13] in balancing the interest of the parties.[14] The court pointed out that the parties in a pretrial motion

8. The suspension from coaching was rescinded at a later date. 746 F.2d at 506.

9. 42 U.S.C. § 1983 (1979), states in relevant part: "Every person who . . . under color of statute, ordinance, regulation, custom, or usage . . . subjects . . . any citizen . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured . . . for redress."

10. 746 F.2d at 506.

11. *Id.*

12. *Id.*

13. 391 U.S. 563 (1968). The Court in *Pickering* held the dismissal of a high school teacher for open criticism of the Board of Education on a matter of public concern, was impermissible under the first amendment. *Id.* at 574.

14. 746 F.2d at 506. The lower court noted that the guidelines set forth in *Pickering* were relevant in balancing the interest of the parties, including: 1) whether maintenance of discipline by immediate supervisors would be affected by plaintiff's criticism; 2) whether plaintiff's employment relationship with the board was so personal and intimate that public criticism would undermine that relationship; 3) whether the employment relationship demanded personal loyalty and confidence; 4) whether plaintiff deliberately made false statements; and, 5) whether plaintiff's claims would impede his performance as a teacher or hinder the actual operation of the school beyond their tendency to anger the board. 554 F.Supp. at 606. The lower court also emphasized that the *Pickering* anal-

had agreed that the letter addressed matters of public concern, one of the factors considered under the *Pickering* analysis.[15]

Defendants argued the *Connick* decision was applicable because although it had been stipulated that parts of the letter addressed matters of public concern, the letter contained details which were not of interest to the public. The court, however, distinguished *Connick* as a situation in which the employee's communication addressed matters of personal interest, not matters which were of concern to the public.[16]

The Ninth Circuit noted that *Connick* reiterated an important principle set forth in *Pickering*. Where an issue is a matter of legitimate public concern, free and open debate is vital to the decision making process.[17] The court explained that *Connick* did not justify finding the plaintiff's letter to be a communication not protected by the first amendment because it contained details not of public interest. Instead, the court made it clear that under *Connick*, the test of whether an employee's speech addressed a matter of public concern must be determined by the content, form, and context of a given statement as revealed by the whole record.[18] Applying that standard, the court concluded the subject matter of the letter was of public concern and did not lose its status as a protected communication because it contained some details some details not of interest to the public.[19]

The court then addressed the defendants' contention that the injunction was overly broad in that it barred enforcement of any policy which prohibited direct communication by teachers with members of the Board of Education on matters of concern to the public.[20] The court stated that the defendants' assertion was without merit because no case law supports the proposition that there may be matters of public concern to which a "chan-

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ysis considered that the operation of a school system is of general public concern, therefore those involved in its operation have the right to address pertinent issues. *Id.*

15. 746 F.2d at 507.

16. *Id.*

17. *Id.* The Supreme Court in *Pickering* went on to conclude that teachers should be able to comment freely on issues which touch upon the operation of the school system. 391 U.S. at 572.

18. 746 F.2d at 507.

19. *Id.*

20. *Id.*

nels" policy might apply.[21] Additionally, the court emphasized the injunction was within the limits of *Connick* and that the focus of the controversy was not the boundaries of the injunction, but rather the actual prohibitions placed on plaintiff's right to comment on matters of public concern.[22]

Also without merit was defendants' contention that the action should be one for defamation rather than for violation of plaintiff's civil rights under section 1983.[23] In rejecting this argument, the court observed that the damages claimed under the statute[24] must be tailored to the protected interest. According to the court, since the protected interest was plaintiff's first amendment rights, the award for damages resulting from a violation of those rights was consistent with the statute.[25]

III. Conclusion

The Ninth Circuit's approach indicates that the free speech rights of school teachers will not be abridged when they comment on matters of public concern. The court's application of the *Pickering* test to weigh a teacher's first amendment interest with those of the state in promoting efficient public service, also affirms the viability of that test in the Ninth Circuit.

When there is a question as to whether a communication is of public concern, the court's opinion suggests it will focus on the subject matter of the statement. In the future, courts should acknowledge, as the court did here, that statements of public concern should not lose their protected status under the first

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21. *Id.*

22. *Id.*

23. *Id.* at 508. The court also disposed of three other arguments raised by the defendants: 1) the challenge that the jury instructions were improper was rejected; 2) the contention that the superintendent was entitled to good faith immunity was held invalid in light of *Pickering*; and, 3) the claim that award of attorney's fees was inappropriate was accepted insofar as the court remanded that aspect of the case to correct any discrepancy which might be apparent. *Id.*

24. *See* Busche v. Burke, 649 F.2d 509 (7th Cir.), *cert. denied*, 454 U.S. 897 (1981). In *Busche*, the court held that in a Section 1983 action, plaintiff could receive damages for mental and emotional distress by demonstrating that the injury was caused by the infraction. 649 F.2d at 519 n. 13.

25. 746 F.2d at 508. *See also*, Carey v. Piphus, 435 U.S. 247 (1978).

amendment simply because they contain some details not of interest to the public.

*Samuel Santistevan**

* Golden Gate University School of Law, Class of 1986.

ZONING AND THE SUPPRESSION OF FREE SPEECH

I. INTRODUCTION

In *Playtime Theaters, Inc. v. City of Renton*,[1] a municipal zoning ordinance restricted the location of adult motion picture theaters.[2] The Ninth Circuit ruled that a substantial state interest to justify that ordinance could not be found where the City had relied solely on the experiences of other towns and cities,[3] and that the existence of predominately legitimate concerns behind the ordinance did not establish that the regulation was unrelated to the suppression of speech.[4]

In April, 1981, the City of Renton, Washington passed a zoning ordinance, which restricted the location of adult motion picture theaters to only 520 acres of the area encompassed by the City.[5] Most of those 520 acres, however, were unavailable.[6]

At the time the ordinance was passed, there were no adult theaters located in Renton.[7] However, in January, 1982, Playtime Theaters acquired an existing movie theater in which it wanted to use to exhibit adult motion pictures.[8] The theater was

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1. 748 F.2d 527 (9th Cir. 1984) (per Fletcher, J.; the other panel members were Farris, J., and Jameson, J., sitting by designation).

2. Renton, Wash., Ordinance 3526 (April 1981). The ordinance prohibited the location of the theaters within 1000 feet of any residential zone or single or multiple family dwelling, any church or other religious institution, and any public park or area zoned for use as a public park. In addition, the ordinance prohibited any such theater from locating within one mile of any public or private school.

The ordinance was amended after initiation of the litigation. An elaborate statement for the enactment of the ordinance was adopted, and the required distance from schools was reduced from one mile to 1,000 feet.

3. 748 F.2d at 537.

4. *Id.*

5. *Id.* at 534.

6. *Id.* A substantial part of the area was occupied by a sewage disposal and treatment plant, a horseracing track, a business park suitable only for industrial use, a warehouse and manufacturing facilities, an oil tank farm, and a fully developed shopping center.

7. *Id.* at 530.

8. *Id.*

within the area where adult pictures were proscribed by the ordinance.

Playtime filed an action in federal court seeking both a declaration that the ordinance was unconstitutional and a permanent injunction against its enforcement. Subsequently, the City of Renton brought suit in state court seeking a declaratory judgment that the ordinance was constitutional on its face and as applied to Playtime's proposed use. Renton moved to dismiss Playtime's federal action on the ground that the federal court should abstain in favor of the state action. The district court denied the motion,[9] and eight months later granted a preliminary injunction.[10]

Subsequently, Playtime began exhibiting adult motion pictures at one of its theaters. The district court then vacated the preliminary injunction[11] and denied the permanent injunction, finding that the ordinance furthered a substantial state interest, was unrelated to the suppression of speech, and was no more restrictive than necessary to further the state interest.[12] Playtime appealed to the Ninth Circuit.

II. THE COURT'S ANALYSIS

The Ninth Circuit first determined that abstention was not mandated.[13] The Court then examined whether the zoning ordi-

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9. *Id.*

10. *Id.* at 532.

11. *Id.*

12. *Id.*

13. In Railroad Commission v. Pullman Co., 312 U.S. 496 (1941), the Supreme Court held that a federal court, when asked for an injunction, should avoid needless friction with state policies which might result from tentative construction of state statutes and premature adjudication on their constitutionality. *Id.* at 500.

The Ninth Circuit has devised three factors, all of which must be applicable, in order to abstain under *Pullman*. They are: (1) the suit must touch a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative for adjudication exists; (2) a definitive ruling on the state issue in question must be capable of ending the controversy; and, (3) the possibly determinative issue of state law must be doubtful. J-R Distributors, Inc. v. Eikenberry, 725 F.2d 482, 487-88 (9th Cir. 1984).

In *Playtime Theaters*, the Ninth Circuit found absention not necessary due to the strong federal interest in first amendment cases. It noted that absention could result in the suppression of free speech, but would not eliminate or materially alter the constitutional issues presented. 748 F.2d at 532.

In Younger v. Harris, 401 U.S. 37 (1971), the Supreme Court held that federal courts should not enjoin pending state criminal prosecutions except under extraordinary cir-

nance was constitutional.

In *United States v. O'Brien*,[14] the United States Supreme Court held that in the regulation of non-speech a sufficiently important governmental interest can justify incidental limitations on first amendment freedoms.[15] It determined that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and, if the incidental restriction on alleged first amendment freedoms is no greater than is essential to the furtherance of that interest.[16]

In considering the existence of a substantial state interest, the Ninth Circuit found the record, as presented by Renton, to be very thin.[17] The ordinance itself contained only conclusory statements,[18] no record of the public hearing had been made, and those who had attended it remembered little other than that it had happened.[19] The Court pointed out that in other cases, where similar ordinances had been held constitutional, such ordinances were the product of either the "culmination of a long period of study and discussion" or "reports and affidavits

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cumstances, and that the possible unconstitutionality of a statute "on its face" does not in itself justify an injunction against good faith attempts to enforce it. *Id.* at 41, 54.

The Ninth Circuit has refused to extend this rule generally to civil cases. Goldie's Bookstore, Inc. v. Superior Court, 739 F.2d 466, 469 (9th Cir. 1984). Those civil cases to which it has been extended have arisen in a criminal or quasi-criminal context. *Id.* at 469-70. The Ninth Circuit has devised a test for application of the *Younger* rule to a civil suit: the civil suit must bear a similarity to criminal proceedings or otherise implicate state interests vital to the operation of state government. Miofsky v. Superior Court, 703 F.2d 332 (9th Cir. 1983).

The *Playtime Theaters* court found that a civil case seeking only declaratory relief does not have such characteristics, 748 F.2d at 533, and consequently, since Playtime Theaters had not violated the ordinance prior to challenging it, the case was not subject to a *Younger* abstention. *Id.*

14. 391 U.S. 366 (1968).

15. *Id.* at 376.

16. *Id.* at 377.

17. 748 F.2d at 536.

18. *Id.* An elaborate statement of reasons for the enactment of the ordinance was contained in the amendment passed after the initiation of the litigation. The reasons included statements such as that various areas in the City "should be free of adult entertainment land uses," that "the image of the City . . . will be adversely affected by the presence of adult entertainment land uses" and that "such land uses should be separated from uses with characteristics different from itself." *Id.* at 530 n.3.

19. *Id.*

from sociologists and urban planning experts."[20]

Renton had not studied the effects of adult theaters, nor had it applied any such findings to the particular problems or needs of Renton.[21] The district court had found a substantial state interest only by considering Renton's reliance on the experiences of other towns and cities.[22]

The Ninth Circuit held that, although Renton could have used the experience of other cities as *part* of the relevant evidence upon which to base its actions, such experiences simply are not sufficient to sustain the city's burden of showing a significant governmental interest.[23]

Renton also had to show that its zoning decision was "motivated by a desire to further a compelling governmental interest unrelated to the suppression of free expression," to satisfy the *O'Brien* test.[24] The record submitted to the Ninth Circuit, however, raised an inference that a motivating factor behind the ordinance was suppression of the content of the speech, rather than mere regulation of the effects of the mode of that speech, because many of the stated reasons for the ordinance were no more than expressions of dislike for its content.[25] Because the city had little empirical evidence demonstrating the alleged deleterious effect of adult theaters, it failed to rebut this inference.[26]

The district court upheld the ordinance because it found Renton's predominate concerns were legitimate.[27] However, where there are mixed motives, as in this case, the court must determine whether a motivating factor in the zoning decision was to restrict the exercise of first amendment rights.[28] If so, the zoning ordinance is impermissible.[29]

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20. *Id.*
21. *Id.* at 537.
22. *Id.* at 536.
23. *Id.* at 537.
24. *Id.* (citing Tovar v. Billmeyer, 721 F.2d 1260, 1266 (9th Cir. 1983)).
25. 748 F.2d at 537.
26. *Id.*
27. *Id.*
28. *Id.* (quoting *Tovar*, 721 F.2d at 1266).
29. 721 F.2d at 1266.

Renton failed to rebut the inference that a motivating factor behind the ordinance was suppression of the content of the speech. Therefore, Renton failed to show that its regulation was unrelated to the suppression of speech.[30]

Renton argued that even if it had effectively banned adult theaters, the ordinance was constitutional because similar adult theaters existed in nearby Seattle.[31] The Court pointed out, however, that such an argument was rejected by the Supreme Court in *Schad v. Borough of Mount Ephraim*,[32] because the liberty of expression in appropriate places may not be abridged on the ground that it may be exercised in some other place.[33]

III. Conclusion

The zoning ordinance passed by Renton created a substantial restriction on speech. There remained virtually no location where an adult motion picture theater could operate. Because of the nature of the statements made by the City in its amended ordinance, it is apparent that at least part of its motivation was the elimination of such theaters from Renton solely because of a dislike for the content of the pictures.

Although a municipality clearly has the power to make zoning decisions for the health and welfare of its citizens,[34] such decisions may not subsume first amendment rights.[35] Strict requirements for the restriction of free speech have been designed by the Supreme Court for the protection of this constitutional right, and the City of Renton failed to demonstrate that its actions were within these requirements. The Ninth Circuit recognized this failure, and correctly reversed the decision of the district court sustaining the ordinance.

*Marlis McAllister**

30. 748 F.2d at 537-38.
31. *Id.* at 538.
32. 452 U.S. 61 (1981).
33. 748 F.2d at 538 (citing *Schad*, 452 U.S. at 76-77).
34. 748 F.2d at 534. *See also* Berman v. Parker, 348 U.S. 26, 32-33 (1954).
35. 748 F.2d at 534. *See also Schad*, 452 U.S. at 68.
* Golden Gate University School of Law, Class of 1986.

NINTH CIRCUIT NARROWS THE SCOPE OF SEX-BASED WAGE DISCRIMINATION CLAIMS UNDER TITLE VII

I. INTRODUCTION

In *Spaulding v. University of Washington*,[1] the Ninth Circuit rejected plaintiffs' claim charging the defendent with sex-based wage discrimination[2] under 42 U.S.C. §1983,[3] the Equal Pay Act[4] and Title VII to the Civil Rights Act of 1964.[5]

In March 1972, members of the school of nursing faculty filed a petition with the University alleging sex-discrimination.[6] The University subsequently responded with a salary increase,[7] but the nursing faculty remained dissatisfied.[8] Subsequently, plaintiffs applied for, and the United States Department of Justice issued, a right to sue letter to plaintiffs who ultimately filed

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1. 740 F.2d 686 (9th Cir.) (per Wallace, J.; the other panel member was Schroeder, J. concurring) *cert. denied*, ___U.S.___, 105 S. Ct. 511 (1984).

2. 740 F.2d at 691-92.

3. 42 U.S.C. §1983 (1982) states:

"Every person who. . .subjects. . .any citizen of the United States. . .to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress."

4. 29 U.S.C. §206(d)(1) (1982) states:

> No employer. . .shall discriminate. . .between employees on the basis of sex by paying wages to employees. . .at a rate less than the rate he pays wages to employees of the opposite sex. . .for equal work. . .which requires equal skill, effort and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor. . .than sex.

5. In relevant part 42 U.S.C. §2000e-2(a) (1982) states:

"It shall be an unlawful employment practice for an employer—(1) to fail to refuse to hire any individual, or otherwise to discriminate against any individual with respect to his compensation. . .of employment, because of such individual's. . .sex. . . ."

6. 740 F.2d at 692.

7. *Id.*

8. *Id.*

suit.[9]

In August of 1977, the district court referred the case to a federal magistrate.[10] The magistrate sat as special master and heard the merits of the case,[11] whereupon he stated that he planned to dismiss the action.[12] While preparing his findings and conclusions, the Ninth Circuit decided *Gunther v. County of Washington*.[13] After requesting memoranda from the parties on the effect of *Gunther* on his ruling, the special master concluded that *Gunther* did not alter the outcome of the case. As a result, he recommended that the district court dismiss.[14] After an appeal,[15] the district judge reviewed the magistrate's findings of fact under the clearly erroneous standard and adopted them.[16]

On appeal, plaintiffs alleged that the district court erred in not reviewing the special master's findings *de novo*,[17] that the district court erred in holding that the nursing faculty had failed to establish the substantially equal work requirement of the Equal Pay Act,[18] and that the district court erred in holding that the University had not violated Title VII of the Civil Rights Act

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9. During the interim a group entitled the Woman's Salary Inequity Committee was formed. It sent a letter to the Office for Civil Rights of the United States Department of Health, Education, and Welfare and to the Washington State Human Rights Commission. The Committee then filed charges with the Equal Opportunity Commission and the University's Human Rights Commission. *Id.* at 692-93.

10. The district judge *sua sponte* referred the case pursuant to 42 U.S.C. §2000e-5(f)(5), FED. R. CIV. P. 53, and Local MAG. R. 21. *Id.* at 693.

11. *Id.* The order of reference expressly required the magistrate to hear the case on the merits and to report recommended findings of fact, conclusions of law and disposition back to the district court. This procedure is pursuant to FED. R. CIV. P. 53(e). *Id.*

12. Under FED. R. CIV. P. 41(b) a magistrate may grant a defendant's motion for involuntary dismissal. The magistrate had concluded that the nursing faculty had failed to show that they performed substantially equal work compared to male faculty members in other departments and that the Equal Pay Act standard governed claims under Title VII and section 1983. *Id.*

13. 623 F.2d 1303 (9th Cir. 1979) *aff'd*, 452 U.S. 161 (1981). The Ninth Circuit held that a plaintiff who fails to show that she performs substantially equal work is not precluded from suing under Title VII for relief from intentionally discriminatory compensation practices unless such practices are authorized by one of the four Equal Pay Act affirmative defenses. 623 F. 2d at 1310-13.

14. 740 F.2d at 693.

15. Spaulding v. Univ. of Wash., 676 F. 2d 1232 (9th Cir. 1982). The court held that the special master was required to file a transcript of the proceedings before him with the district court. *Id.* at 1235.

16. 740 F.2d at 693.

17. *Id.* at 694.

18. *Id.* at 696.

of 1964.[19]

II. THE COURT'S ANALYSIS

After holding that Federal Rule of Civil Procedure 53(b) requires that a special master's findings of fact should be accepted unless clearly erroneous,[20] the Ninth Circuit turned to the merits of plaintiffs' Equal Pay Act claim.[21] Plaintiffs argued that they had performed substantially equal work. To meet their burden, plaintiffs compared their jobs to those of male faculty members of other schools in the university[22] and used statistics.[23]

With regard to the Equal Pay Act, the Ninth Circuit stated that it prohibits an employer from discriminating in wage payments on the basis of sex.[24] To make out a *prima facie* case under the Act the plaintiff bears the burden of establishing it did not receive equal pay for substantially equal work.[25] If a *prima facie* case is established, defendant may attempt to show that the disparity is based on either a seniority system, a system which measures earnings by quantity or quality of production, or a factor other than sex.[26] Under the Act equal work is measured by comparing jobs on the basis of skill, effort, responsibility and similar working conditions.[27] Actual job performance and content, rather than job descriptions, are determinative.[28]

Plaintiffs contended that they performed substantially

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19. *Id.* at 699.

20. *Id.* at 695-96. The court stated that it was Congress' intent in citing FED. R. CIV. P. 53(b) in 42 U.S.C. §2000e-5(f)(5) to require courts to adopt a special master's findings of fact unless clearly erroneous. *Id.* at 695 (citing White v. General Services Administration, 652 F.2d 913 (9th Cir. 1981)). Therefore, the court held that it should not undertake its own *de novo* review of the magistrate's findings. *Id.* at 696.

21. 740 F.2d at 696.

22. *Id.* The other schools included "health services, social work, architecture, urban planning, environmental health, speech and hearing, rehabilitative medicine and pharmacy practice." *Id.*

23. *Id.* at 697. The statistics attempted to compare sixty-six individual faculty members from selected departments with members of the nursing faculty "based on degrees held, experience and merit." *Id.*

24. 29 U.S.C. §206(d)(1).

25. 740 F. 2d at 696-97. *See* Hein v. Oregon College of Education, 718 F. 2d 910, 913 (9th Cir. 1983); Corning Glass Works v. Brennan, 417 U.S. 188 (1954).

26. 740 F.2d at 696-97.

27. *Id.* at 697.

28. *Id.* Each claim, therefore, must be determined on a case-by-case basis. *Id.*

equal work to that performed by specified comparator[29] faculty members. Plaintiffs argued both jobs required "preparation and teaching of courses, research and publication, committee work, advising of students and community service."[30] The Ninth Circuit concluded that although the comparator faculty positions were facially similar, the special master was correct in concluding that plaintiffs had now shown substantial equality between jobs.[31] The court stated that the University's departments placed varying degrees of emphasis on skills and that nursing historically had been considered a discipline distinct from the comparators' professions.[32] The court found the statistical evidence plaintiffs used to show substantial work inadequate.[33] Because an adequate showing of substantially equal work was not shown by plaintiffs, the Ninth Circuit affirmed the district court's dismissal of the Equal Pay Act claim.[34]

In addressing the nurses Title VII claim, the Ninth Circuit directed its inquiry to whether plaintiffs had established a *prima facie* case.[35] Under Title VII, a plaintiff has two theories or models available in litigation. Under the disparate treatment model, plaintiff must show proof of discriminatory actions taken by an employer from which a discriminatory motive can be inferred.[36]

The court stated that under *Gunther* a Title VII cause of

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29. A "comparator" is the legal term for a person or group used by plaintiffs who are benefitting from the unequal pay scale.

30. 740 F. 2d at 697.

31. *Id.* The district judge adopted that finding and the Ninth Circuit concluded it was not clearly erroneous.

32. *Id.* at 697-98.

33. *Id.* at 698. With regard to the statistical evidence, the court stated: "It did not adequately account for prior job experience, rank or multiple degrees, and, most important, it did not adequately evaluate the actual work performed by various faculty members." *Id.* In a broader statement the court argued that "statistical evidence may demonstrate a pay disparity, but a difference in pay between jobs which women primarily hold and jobs which men primarily hold does not state a *prima facie* Equal Pay Act case if the jobs are not substantially equal." *Id. See* Horner v. Mary Institute, 613 F. 2d 706, 715 (8th Cir. 1980).

34. 740 F.2d at 698-99.

35. *Id.* at 699.

36. *See* International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n. 15 (1977); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Again, each case must be decided on its particular facts. 740 F. 2d at 700.

action exists outside of the Equal Pay Act.[37] The Ninth Circuit noted that it would not articulate the minimum factors necessary for a plaintiff to establish a Title VII cause of action concerning sex-based wage discrimination.[38] However, since plaintiffs were unable to show substantial equality between jobs, the court held that disparity in wage compensation alone was insufficient to establish a *prima facie* case.[39] Under the court's analysis plaintiffs were then required to prove intent to discriminate to make out a case of disparate treatment.[40]

The nurses argued that the district court was clearly erroneous in not finding discriminatory intent based on the proffered testimony, evidence of an alleged predisposition toward discriminatory conduct by various university officers and statistics.[41] The Ninth Circuit found that all of the evidence taken seperately, and in bulk, was insufficient to support an inference of an illegally discriminatory motive on the part of the University.[42] Therefore, the district court's finding was affirmed.[43]

The Ninth Circuit then turned to plaintiffs' second Title VII theory, disparate impact.[44] The court stated that the elements of this cause of action are the occurence of certain outwardly neutral employment practices, and a significant adverse or disproportionate impact on persons of a particular sex by the employer's facially neutral acts or policies.[45] Under this model,

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37. 740 F.2d at 699 (citing *Gunther*, 623 F. 2d at 1321. "[A] plaintiff is not precluded from establishing sex-based wage discrimination under some other theory [than substantial equality] compatible with Title VII.").

38. 740 F.2d at 697.

39. *Id.* "We will not, therefore, infer intent merely from the existence of wage differences between jobs that are only similar. *Gunther* does not require this." *Id.*

40. *Id.* at 701. The nurses had argued for an interpretation of *Gunther* which the court called the "comparability plus" test. *Id.* Under this test the court would require "only some degree of job comparability plus some combination of factors including direct and circumstantial evidence of discriminatory conduct and pay disparities." *Id.* The court vehemently rejected this test and stated: "[S]uch an unwieldy test might allow plaintiffs to bolster inadequate showing of comparability with a confusing potpourri of plus factors, plunging courts into standardless supervision of employer/employee relations." *Id.*

41. *Id.*

42. *Id.* at 701-04.

43. *Id.* at 701.

44. *Id.* at 705. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). The court stated that Title VII protects people from "not only overt discrimination but also practices that are fair in form, but discriminatory in operation."

45. *Id.*

plaintiffs are not required to prove a discriminatory motive, however, they must prove the discriminatory impact at issue.[46]

In evaluating the nurses' arguments, the court reasoned that since there had been no showing of substantially equal work, plaintiffs had only the comparable worth theory upon which to rely.[47] As a threshold inquiry, the Ninth Circuit asked whether the disparate impact model should be available to plaintiffs who "make a broad-ranging sex-based claim of wage discrimination based on comparable worth."[48] Answering this difficult issue in the negative, the court stated that such "an extension of Title VII would plunge us into uncharted and treacherous areas."[49] Therefore, the court held that the Title VII disparate impact model does not encompass sex-based wage discrimination claims between comparable jobs.[50] Since the nursing faculty was unable to show a facially neutral policy which caused wage discrimination, their disparate impact arguments were rejected.[51]

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46. *Id.* at 708. The court stated: "What matters is the substance of the employer's acts and whether those neutral acts are a non-job-related pretext to shield an indvidious judgment."

47. *Id.* The court summarized plaintiffs' case as follows: "[T]hey have shown a disparate impact by showing a wage disparity between only comparable jobs and this disparate impact is caused by the facially neutral policy or practice of the University of setting wages according to market prices for jobs in the disciplines." *Id.* at 705. For an excellent presentation of the comparable worth theory see Note, *Equal Pay, Comparable Work and Job Evaluation*, 90 YALE L. J. 657 (1981); Blumrosen, *Wage Discrimination, Job Segregation and Title VII of the Civil Rights Act of 1964*, 12 U. MICH. J. L. REF 399 (1979). The basic premise of comparable worth appears to be that the market does not accurately compensate people for the value of their work because of pervasive discrimination based on job classifications traditionally held by women. Compare, Nelson, Opton and Wilson, *Wage Discrimination and the "Comparable Worth" Theory in Perspective*, 13 U. MICH. J. L. REF 233 (1980) and Beller, *The Economics of Enforcement of an Antidiscrimination Law: Title VII of the Civil Rights Act of 1964*, 21 J. L. AND ECON. 359 (1978).

48. 740 F.2d at 705.

49. *Id.* at 706.

50. *Id.* It is interesting to note that the court stated that *Gunther* being a disparate treatment case was of no help in evaluating the nursing faculty's impact claim. *Id.* at 705. The court cited and discussed with approval other cases which had rejected comparable worth. *See* Lemons v. City and County of Denver, 620 F. 2d 228 (10th Cir.), *cert. denied*, 449 U.S. 888 (1980); Christensen v. State of Iowa, 563 F. 2d 353 (8th Cir. 1977); Power v. Barry County, 539 F. Supp. 721 (W.D. Mich. 1982). The Ninth Circuit stated: "We agree. . . and join those courts in refusing to accept a construction of Title VII. . .whenever employees of different sexes receive disparate compensation for work of differing skills that may, subjectively, be of equal value to the employer, but does not command an equal price in the labor market." 740 F.2d at 707.

51. *Id.* at 708-09. The nurses advanced four arguments each of which they claimed would provide a foundation for their discriminatory impact claim. The first was that by

III. Conclusion

The *Spaulding* decision is important because it may have significant impact on future sex-based wage discrimination cases. Although the court was unanimous in its decision, Judge Schroeder, in a special concurrence, did not join the court in its holding that comparable worth is not available to plaintiffs under the Title VII disparate impact model.[52] Since plaintiffs disclaimed having presented any comparable worth theory in their brief,[53] the court's holding may be criticized as premature.

However, the Ninth Circuit, by this opinion, continues to lead in determining the contours of Title VII sex-discrimination employment cases. By precluding plaintiffs from raising comparable worth arguments under the disparate impact model, the court is setting a trend which other courts will probably follow.[54] Moreover, the Ninth Circuit may also be ready to limit the contours of comparable worth on the disparate treatment model.[55]

Although it was unclear from *Gunther* how much leeway the court would allow in Title VII cases,[56] the court can now be seen

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using the market to set wages, the University had violated Title VII. The court rejected this argument and held that disparate impact analysis does not apply when competitive market prices are paid. Plaintiffs advanced three other facially neutral policies, all of which were rejected. *Id.* at 708-09.

52. *Id.* at 709-10. Judge Schroeder argued that the majority's analysis of this issue "confusedly meshe[d] adverse impact with varying concepts of comparable worth." *Id.* at 710. Furthermore, it was argued that it was inappropriate for the court to "render any definitive ruling on the validity of comparable worth as a tool in employment discrimination cases." *Id.* This is because plaintiff's had only tried to compare work, not worth. In conclusion he stated, "the confusion is evident. . .[in] the majority opinion in which the majority fails to define what it means by comparable worth." *Id.*

53. *Id.* at 710.

54. The Ninth Circuit approvingly cites Power v. Barry County, 539 F. Supp. 721 (W.D. Mich. 1982), where the district court held that although Title VII allows a cause of action to be stated for jobs that are not equal or substantially equal of intentional discrimination is shown, evidence of comparable worth cannot be used under the disparate impact model of Title VII. *Id.* at 726. The court stated that it "cannot and will not, evaluate different jobs and determine their worth to an employer or to society and then, on that basis alone, determine whether Title VII or the Equal Pay Act has been violated." *Id.* at 726-27.

55. The recently decided American Federation of State, County and Municipal Employees (AFSCME) v. State of Washington, 578 F. Supp. 846 (W.D. Wash. 1983) is currently being reviewed by the Ninth Circuit. The district court had ruled that the State of Washington violated Title VII when, under its job classification system, predominately female job categories were paid less than male job categories involving comparable skill, accountability and working conditions. 33 F.E.P. 808 (W.D. Wash. 1983).

56. 740 F.2d at 700.

as giving a clear direction in this area. It is evident from the strong language of this opinion that the Ninth Circuit is unwilling to interfere in an employer's determination of wage compensation based on the competitive job market.[57] This may be wise because Title VII is concerned with assuring equal access to jobs regardless of sex, to jobs and not with equalizing pay for different jobs.[58] In this light the Ninth Circuit's jurisprudence is commendable.

*Douglas M. Buchanan**

57. Scholars and courts have pointed out that a large variety of non-discriminatory factors may be at work in creating or perpetrating the employment of women to only certain job categories. These may include familial and peer expectations, desire for part-time work, or work with flexible hours, reluctance to pioneer in non-traditional jobs and lack of information about higher paying jobs.

58. *See supra* note 5.

* Golden Gate University School of Law, Class of 1986.